

1 Penalty Under 21 U.S.C. § 851.” On June 14, 2002, Defendant was found guilty by
2 jury trial of both counts of the indictment. On April 17, 2003, the Court sentenced
3 Defendant to 240 months custody on each count to run concurrently, followed by 10
4 years of supervised release.

5 To arrive at this sentence, the Court calculated a base offense level of 34, based
6 upon 18.54 kilograms net weight of cocaine and increased the base offense level to 37,
7 because Defendant was a Career Offender and the statutory maximum for the offense
8 is life. USSG § 4B1.1. Defendant’s Criminal History Category is VI. Id. Finally, due
9 to the § 851 Enhancement, the Guideline range is 360 months to life, with a minimum
10 mandatory penalty of 20 years.

11 The Court then made a 6-level “combination of circumstances” variance under
12 5K2.0, to a level 31, with a range of 188 to 235 months. However, since the offenses
13 for which Defendant was convicted were 20 year minimum mandatory offenses, the
14 Court sentenced Defendant to 240 months on each count, to run concurrently.

15 DISCUSSION

16 Amendment 782

17 Under 18 U.S.C. § 3582(c)(2), district courts have the authority to modify a term
18 of imprisonment when a defendant was sentenced based on a guideline range that is
19 subsequently lowered by amendment to the USSG. When determining whether a
20 sentencing adjustment is warranted pursuant to § 3582(c)(2), the court must “determine
21 the amended guideline range that would have been applicable to the defendant if the
22 amendment(s) ... had been in effect at the time the defendant was sentenced.” USSG §
23 1B1.10(b)(1). “The court shall substitute only the [applicable amendment] for the
24 corresponding guideline provisions that were applied when the defendant was sentenced
25 and shall leave all other guideline application decisions unaffected.” Id. If the
26 amendment does not lower the guideline range under which the defendant was
27 sentenced, a reduction in sentence is not authorized. USSG § 1B1.10(a)(2).

28 Amendment 782 modified the Drug Quantity Table in USSG § 2D1.1, which

1 provides the base offense levels for different quantities of various controlled substances.
2 Amendment 782 reduced the base offense levels for most federal drug trafficking
3 crimes by two levels. In July 2014, the U.S. Sentencing Commission promulgated
4 Amendment 788 and amended USSG § 1B1.10, which made Amendment 782
5 retroactive (effective November 1, 2014) but delayed until November 1, 2015 the
6 effective date for orders reducing prison terms based on Amendment 782.

7 Defendant erroneously contends that his sentence was based on §2D1.1 and
8 therefore the base offense level is reduced from 34 to 32. Defendant was sentenced as
9 a Career Offender under §4B1.1, not §2D1.1. Amendment 782 does not apply to drug
10 offenders whose sentences were based upon offense levels calculated by guidelines
11 other than the Drug Quantity Tables in § 2D1.1. Career offenders convicted of drug
12 related offenses are sentenced under the career offender guidelines in § 4B1.1, instead
13 of the drug based guidelines in § 2D1.1. Amendment 782 did not modify the
14 sentencing ranges for career offenders under § 4B1.1. Thus, Amendment 782 does not
15 afford Defendant any relief. See United States v. Thomas, 775 F.3d 982, 983 (8th
16 Cir.2014).

17 Applying the §4B1.1 guidelines, the sentence was, and is still, appropriate.
18 Pursuant to the 21 U.S.C. §851 enhancement, Defendant was found guilty of two
19 offenses with mandatory minimum sentences of 20 years. Amendment 782 did not
20 change statutory mandatory minimum sentences. United States v. Waipa, 2016 WL
21 3430550 (9th Cir. 2016) (the mandatory minimum applies in §3582(c)(2) proceedings);
22 United States v. Jean-Louis, 626 Fed.Appx 901 (11th Cir. 2015); see United States v.
23 Sykes, 658 F.3d 1140, 1147-48 (9th Cir. 2011).

24 In sum, the Amendment 782 motions are denied. (ECF 127, 129).

25 **The Motion for Re-sentencing under Johnson**

26 Based upon the Supreme Court's decision in Johnson, Defendant moves for a
27 reduction of sentence pursuant to 28 U.S.C. §2255. The Supreme Court in Johnson
28 held the residual clause of the Armed Career Criminals Act ("ACCA"), which defined


1 a “violent felony” as any felony that “involves conduct that presents a serious potential
 2 risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B), as unconstitutionally
 3 vague. This so-called residual clause “fails to give ordinary people fair notice of the
 4 conduct it punishes” and “invites arbitrary enforcement,” thereby “violat[ing] the first
 5 essential of due process.” 135 S. Ct. at 2556-57. The requirements of fair notice and
 6 enforcement standards “apply not only to statutes defining elements of crimes, but also
 7 to statutes fixing sentences.” Id. at 2557. For these reasons, Johnson held that
 8 “increasing a defendant’s sentence under the [residual] clause [for crimes of violence]
 9 denies due process of law.” Id.

10 The court concludes that Johnson does not apply to Defendant’s circumstances.
 11 Defendant was subject to the enhanced career offender penalties, not because of a
 12 conviction for a “crime of violence,” but for a prior “controlled substance offense.”
 13 Here, due to the §851 enhancement, Defendant was sentenced to the lowest possible
 14 sentence (the court notes that the Guideline range is 360 months to life, with a minimum
 15 mandatory penalty of 20 years). The term “controlled substance offense” is clearly
 16 defined in USSG §4B1.2; and Defendant sets forth no argument challenging this
 17 provision. Accordingly, this claim necessarily fails.

18 In sum, the court denies the two motions brought pursuant to Amendment 782
 19 (ECF 127, 129) and the motion brought pursuant to 28 U.S.C. §2255. (ECF 132).

20 **IT IS SO ORDERED.**

21 DATED: October 24, 2016

22 
 23 Hon. Jeffrey T. Miller
 United States District Judge

24 cc: All parties
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